Nos. 18-15144, 18-15166, and 18-15255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant–Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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Intervenor-Defendant–Appellant.

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BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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CORPORATE DISCLOSURE STATEMENT

The March for Life Education & Defense Fund makes this disclosure statement pursuant to Federal Rule of Civil Procedure 26.1. The March for Life Education & Defense Fund does not have any parent entities and does not issue stock.

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STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1292(a)(1)(permitting interlocutory appeals of preliminary injunction orders). *See* ER 1 (order granting motion for preliminary injunction dated December 8, 2017); ER 32 (notice of appeal dated January 31, 2018).

STATEMENT OF THE ISSUES

This appeal presents three issues: whether the district court erred in determining that the Plaintiffs had Article III standing; whether the district abused its discretion by preliminarily enjoining the Interim Final Rules based upon the Plaintiffs' procedural Administrative Procedure Act claim; and whether the case was filed in the proper venue.[1]

STATEMENT OF THE CASE

On October 6, 2017, the Departments issued Interim Final Rules ("IFRs") which included protection, in the form of an exemption, for non-

[1] March for Life's brief does not discuss venue, an issue the Departments discuss at some length in their opening brief.

religious nonprofits like March for Life which hold moral convictions against abortion and abortifacient drugs and devices. ER 327.

The State of California filed this action on October 6, 2017, alleging violations of the Administrative Procedure Act's (APA) public notice requirement in 5 U.S.C. § 553, the APA's prohibition on "abuse of discretion" in 5 U.S.C. § 706, the Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fifth Amendment. ER 365. In a first amended complaint filed on November 1, 2017, New York, Maryland, Delaware, and Virginia were added as plaintiffs. The States filed their motion for preliminary injunction on November 9, 2017, asking the Court to bar the federal government from implementing the IFRs. ER 367.

On December 8, 2017, Intervenor-Defendant March for Life filed a motion to intervene in this action. ER 372. The district court granted the States' motion for preliminary injunction in an order issued December 21, 2017. ER 2 at ¶ 2. The district court granted March for Life's motion to intervene on December 29, 2017. The federal government filed its notice of appeal on February 16, 2018, ER 30-31, and the Little Sisters of the Poor filed their notice of appeal on January

26, 2018, ER 34-35. March for Life filed its notice of appeal on January 31, 2018. ER 32-33.

STATEMENT OF FACTS

Defendant March for Life is a pro-life, non-religious, nonprofit organization that exists to protect, defend, and respect human life at every stage, to promote the worth and dignity of all unborn children, and to oppose abortion in all its forms. Mot. to Intervene at 3-4, Docket No. 87 (Dec. 8, 2017).

In March 2010, Congress passed the Patient Protection and Affordable Care Act, Publ. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act" ("ACA"). One ACA provision mandates that any "group health plan" (including employers offering the plan) or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain preventive care services without any cost-sharing. 42 U.S.C. § 300gg-13(a).

The Department of Health and Human Services defined preventive care services to include certain contraceptive devices, items,

and services ("the contraceptive mandate"). 45 C.F.R. § 147.130(a)(1)(iv).

Although the ACA did not specify what preventive care for women included, the Health Resources and Services Administration (HRSA), within the Department of Health and Human Services (HHS), eventually issued guidelines on August 1, 2011 providing that women's preventive care would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines (Aug. 1, 2011).

Among these items are included hormonal oral and implantable contraceptives, IUDs, and products categorized as emergency contraception, all of which March for Life believes can prevent the implantation of a newly conceived human embryo, thereby causing an abortion. On the same day that HRSA issued these guidelines, the federal government promulgated another regulation which exempted some entities that objected to providing contraceptive coverage. 76 Fed. Reg. 46,621 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B).

This second regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46,621, 46,623. The term "religious employer" referred, in general, to churches, religious orders, and their integrated auxiliaries. *See id.* at 46,626; 45 C.F.R. § 147.131(a) (final exemption).

The exemption did not include pro-life, non-religious entities like March for Life, even though its moral convictions mirror the religious beliefs of those churches opposing abortion and prevented it from complying with the contraceptive mandate. Mot. to Intervene, Mancini Decl. ¶ 15, 17, Docket No. 87 (Dec. 8, 2017). Accordingly, to vindicate its right to operate in a manner that is consistent with its moral convictions, March for Life sued the federal government on July 7, 2014. *March for Life, et al. v. Burwell, et al.*, No. 14-cv-1149 (July 7, 2014 D.D.C.).

March for Life secured a permanent injunction, *March for Life,* et al. *v. Burwell, et al.*, 128 F. Supp. 3d 116 (D.D.C. 2015), and the federal government appealed that judgment, *March for Life,* et al. *v. Burwell et*

al., 128 F. Supp. 3d 116 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015). That appeal, though in abeyance, is pending.

On October 6, 2017, the federal government issued Interim Final Rules that included an exemption for non-religious nonprofits, like March for Life, which hold moral convictions against abortion and abortifacient drugs and devices. In the preamble explaining the reasons for the new IFRs, the federal government specifically noted the lawsuit filed by March for Life. ER 290 at ¶ 1. The Moral IFR exempts March for Life from having to provide contraceptive coverage in its health care plans "to the extent [that it objects] based on [its] sincerely held moral convictions." 45 C.F.R. § 147.133(a)(2). It represents the first instance in which the federal government has accommodated non-religious but morally convicted non-profits from the unconstitutional burden represented by the contraceptive mandate.

The new exemption provides March for Life the assurance that it can continue to pursue its life-saving mission free from the threat of government fines and penalties for refusing to comply with the contraceptive mandate.

SUMMARY OF THE ARGUMENT

First, the States lack standing, which they bear the burden of demonstrating. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The States do not demonstrate concrete, particularized injuries that are causally connected to the IFRs, and they cannot assert quasi-sovereign interests on their citizens' behalf against the federal government. The States have not proven that the IFRs will inflict a cognizable economic injury on them; rather, they rely on various speculative claims of harm. Furthermore, the States' procedural injury claims are insufficient. Plaintiffs' alleged injury depends on third-party decisions, not direct government action. And the States' interest in the health and wellbeing of its residents cannot form the basis for standing in a suit against the federal government. *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

Second, the balance of the equities counsels against an injunction, especially a nationwide one. The district court did not correctly balance, or even fully account for, all the relevant interests at stake. The district court uncritically accepted the States' vague and inflated guesses about the number of plan beneficiaries who would lose

contraceptive coverage and eventually impose additional pressures on the States to spend more.

Furthermore, the Court failed to properly weigh the interests of those who challenged the HHS Mandate. Although many have favorably settled their cases or obtained permanent injunctions, many others are embroiled in ongoing litigation. The IFRs provided immediate relief from the unjustified and ongoing violation of their consciences, but the district court's injunction eliminated that relief. The IFRs work to strike a balance between providing contraceptives and freedom of conscience; the district court tipped the scales solely towards providing contraceptives.

Third, the district court abused its discretion by determining that Plaintiffs would suffer irreparable harm without an injunction. The States have failed to show the likelihood of their alleged economic harms, and they incorrectly equated their alleged procedural injury with irreparable injury.

Accordingly, because Plaintiffs failed to demonstrate standing, and because the balance of the equities, the public interest, and irreparable harm factors weigh against an injunction in this case,

March for Life asks this Court to reverse the district court's decision, vacate the preliminary injunction, and remand the case with instructions to dismiss for lack of jurisdiction.

STANDARD OF REVIEW

The District Court's determination that the Plaintiffs have Article III standing is reviewed *de novo*. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003) (internal citations omitted).

To demonstrate Article III standing, plaintiffs must show that they have suffered an injury in fact, that is "fairly traceable" to the defendants' actions, and that can likely be redressed "by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). *See also Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003)("To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

The District Court's grant of Plaintiffs' motion for preliminary injunction is reviewed for an abuse of discretion and as to whether the decision was based on "erroneous legal premises." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

ARGUMENT

I. THE STATES LACK STANDING.

The States lack standing because the alleged harms they may suffer as a consequence of the IFRs are too conjectural. This Court should reverse the district court's order, vacate the preliminary injunction, and remand the case with instructions to the district court to dismiss the States' complaint.

The Supreme Court has established that Article III standing involves three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (cleaned up).[2]

To establish standing, a plaintiff may not merely rest on the allegations in its complaint. Instead, it must *prove* standing: "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan* at 561 (cleaned up).

In their complaint and briefing, the States claim that the IFRs and the process by which the Departments adopted them inflict three types of injury. First, an economic injury: they contend that the IFRs, through a chain of events, will eventually impose financial costs on them. ER 252 at ¶ 2. Second, a procedural injury: the States claim as a matter of law that the Departments violated the Administrative Procedure Act by not giving them an opportunity to comment on the rules before they went into effect. ER 278 at ¶¶ 116-121. Third, an

[2] This brief uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See*, *e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017); *Smith v. Kentucky*, 520 S.W.3d 340, 354 (Ky. 2017); *I.L. v. Knox County Board Of Education*, 257 F. Supp. 3d 946, 960, 965, 966 (E.D. Tenn. 2017).

injury to their quasi-sovereign interests: the States contend that some of their residents will be adversely impacted by the IFRs and that they have standing to vindicate their citizens' interests. ER 277 at ¶ 114.

The States have failed to prove that they have standing under any of these theories. They do not demonstrate concrete, particularized injuries that are causally connected to the IFRs, and they cannot assert quasi-sovereign interests on their citizens' behalf against the federal government.

A. The States Have Not Proven That the IFRs Will Inflict a Cognizable Economic Injury on Them.

The States contend that the IFRs will eventually impose new monetary costs upon them. More specifically, they speculate that:

1. Large numbers of previously exemption-ineligible plan sponsors will invoke the newly available exemptions;
2. The beneficiaries of these plans will want to use the items to which the plan sponsors object;
3. As a consequence of the IFRs, large numbers of plan beneficiaries will have no way of securing contraceptives and pregnancy care other than through the state governments;

4. The States will face increased demand for their family planning programs;
5. They will react to that pressure by spending more money;
6. Some women will use less effective forms of contraception or not use contraceptives at all and will consequently experience unintended pregnancies;
7. The unintended nature of these pregnancies will result in adverse health effects that cost money to treat;
8. The States will face increased demand for services provided at state expense to pregnant women and new mothers; and
9. The States will react to that demand by spending more money.

For their economic injury theory to work, the States must carry their burden of proof on each one of these contingencies.

For Article III standing based on economic harm, plaintiffs must suffer an injury to a concrete, particularized economic interest that is "actual or imminent," not "conjectural or hypothetical." *Lujan,* 504 U.S. at 560. Plaintiffs must also show that the economic injury is caused by

the challenged conduct, and that it can likely be "redressed by a favorable decision." *Id.* at 560–61.

Conclusory and conjectural economic harm claims are insufficient for establishing standing on this basis. *See Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1233–34 (10th Cir. 2012) ("The petitioners have failed to meet their burden of showing an injury in fact. Record facts consisting of conclusory statements and speculative economic data are insufficient to lead us to any other conclusion."). In *Wyoming*, the state challenged a Department of the Interior rule limiting the number of snowmobiles permitted in national parks. *Id.* at 1223-25. Wyoming's standing argument was based in part on a claim that fewer snowmobile entries would harm Wyoming's tourism industry and result in decreased tax revenue. *Id.* at 1227. The Tenth Circuit concluded that the data Wyoming submitted, including comments the state submitted before the rule was final, and statistics on the number of snowmobiles entering the park, did not demonstrate that Wyoming would experience economic loss:

> Petitioners in this case have presented no concrete evidence revenues have decreased or will decrease with the 2009 temporary rule in place . . . Petitioners have presented only a generalized grievance and holding

> otherwise might spark . . . unwarranted litigation against the federal government . . . [T]he unavoidable economic repercussions of virtually all federal policies . . . suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact to support state standing. We do not foreclose the argument that reduced tax revenues can provide a state with Article III standing. Rather, a state must show a fairly direct link between the state's status as a recipient of revenues and the legislative or administrative action being challenged.

Id. at 1234.

In *Lujan*, the Supreme Court noted that it is relatively simple to show the causation and redressability factors when the challenged conduct is a government regulation and the plaintiff is the regulation's direct target. 504 U.S. at 562. However, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed." *Id.* (emphasis in original). In this case, the States are claiming that the Departments' failure to force some plan sponsors to violate their consciences by providing certain drugs and devices will inflict an injury upon them. Accordingly, "much more is needed." *Id*. As discussed in detail below, "much more" was not delivered.

The district court's conclusion that the States showed economic injury rested in part on *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), where economic injury was the basis for a state government's Article III standing in a challenge to a federal government program. But that case is inapposite: Texas described the impending economic injury with clear numbers, which were not contested by the federal defendants. *Id.* at 155.

The more analogous case, involving a similar challenge to the IFRs, is one in which the Federal District Court for the District of Massachusetts found that the Commonwealth of Massachusetts failed to establish standing when it offered similarly conclusory statements about economic injury. *Massachusetts v. United States Dep't of Health & Human Servs.*, No. CV 17-11930-NMG, 2018 WL 1257762, at *12 (D. Mass. Mar. 12, 2018) ("[T]he Commonwealth does not identify any employers that are likely to avail themselves of the expanded exemptions, much less identify employees who will cause the Commonwealth the alleged 'significant financial harm'.").[3]

[3] The Massachusetts district court attempted to distinguish the Commonwealth's challenge from California's based on the presence as a Defendant-Intervenor of the California outpost of Little Sisters of the

The States have failed to carry their burden. They have not proven that the nine contingencies listed above will occur. They have failed to demonstrate (without resorting to rank speculation) (1) that meaningful numbers of beneficiaries in their States will be adversely affected by the IFRs; (2) that significant numbers in their States will pursue state-funded assistance; and (3) that the States will as a consequence spend more money. Each of these failures is discussed *seriatim*.

1. *The States have not identified any plan sponsors who will become newly exempt under the IFRs, nor have they proven how many beneficiaries will be affected by the IFRs.*

The States' principal failure is their inability or unwillingness to introduce sufficient evidence that previously exemption-ineligible plan sponsors in their states that were providing abortifacients and contraceptives will invoke the exemption and thus stop providing those

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Poor in this case. The court reasoned that if the California court did not enjoin the IFRs, the Little Sisters would invoke the Religious IFR and thus their plan participants would lose access to contraceptive coverage they had been receiving. However, the Massachusetts court failed to consider that Little Sisters of the Poor, because its employee health insurance is provided through a self-insured "church plan," is functionally exempt from the HHS Mandate, with or without the IFRs. ER 90.

items through their health plans. This is the foundation of their alleged injury; everything else in their chain of causation rests on this essential starting point.

The fact of the matter is that no one knows how many plan sponsors that have been providing abortifacients, contraceptives, and sterilization will invoke the exemption and stop providing some or all of those otherwise mandatory drugs, devices, and procedures. As a result, no one knows how many plan beneficiaries who were using these items would be affected by the IFRs. Neither the Departments nor anyone else "have sufficient data to determine the actual effect of these rules on plan participants and beneficiaries, including for costs they may incur for contraceptive coverage, nor of unintended pregnancies that may occur." ER 307. The Departments correctly observed that "there are multiple levels of uncertainty involved in measuring the effect of the expanded exemption." *Id.* (listing ten difficult-to-predict contingencies).

In the preambles to the IFRs, the Departments attempt to estimate the number of previously exemption-ineligible plan sponsors that have been providing free contraceptives, abortifacients, and

sterilization that will fully or partially invoke the exemption and thus stop providing some of all of these drugs, devices, and procedures. ER 306-315 (Religious IFR); 345-347 (Moral IFR). Carefully explaining their methodology while acknowledging the multiple uncertainties, the Departments estimated that the expanded exemptions will impact the contraceptive costs of approximately 31,700 women of childbearing age that use contraceptives covered by the HHS guidelines. ER 312. Again acknowledging the multiple uncertainties, they conducted a second analysis using a different methodology, this time reaching an estimate of 120,000. ER 315. Because third parties like the States are neither the objects nor subjects of the regulation, the Departments understandably did not pile further contingencies upon the acknowledged uncertainties to speculate about the potential impact on the demand for state-supported services.

These estimates, especially the first, rely in large measure on the number of entities that challenged the HHS Mandate in court and the size of their workforces. ER 307 *et seq*. The Departments' estimates do not appear to fully acknowledge that many of these litigating parties

will be exempt from the Mandate, with or without the IFRs, because of their success in litigation.

The plaintiffs in many of the lawsuits filed by nonprofits against the accommodation reached favorable settlements with the federal government, under which they are free to offer health plans consistent with their religious convictions. These include *Archdiocese of St. Louis v. Hargan*, No. 4:13−cv−02300, Doc. No. 77 (E.D. Mo. Oct. 23, 2017); *Brandt v. Price*, No. 2:14-cv-00681, Doc. No. 58 (W.D. Pa. Oct. 20, 2017); *Catholic Diocese of Biloxi, Inc. v. Burwell*, No.1:14-cv-00146, Doc. No. 32 (S.D. Miss. Oct. 23, 2017); *Christian and Missionary Alliance Found., Inc. v. Burwell*, No. 2:14-cv-580, Doc. No. 79 (M.D. Fla. Nov. 3, 2017); *Diocese of Cheyenne v. Sebelius*, No. 2:14-CV-00021, Doc. No. 64 (D. Wyo. Oct. 24, 2017); *Diocese of Ft. Wayne-South Bend, Inc. v. Hargan*, No. 1:12-cv-00159, Doc. No. 136 (N.D. Ind. Oct. 23, 2017); *Insight for Living Ministries v. Burwell*, No. 4:14-cv-00675, Doc. No. 56 (E.D. Tex. Oct. 31, 2017); *Persico v. Price*, No. 1:13-cv-00303, Doc. No. 95 (W.D. Pa. Oct. 20, 2017); *Michigan Catholic Conf. v. Hargan*, No. 1:13-cv-01247, Doc. No. 68 (W.D. Mich. Nov. 2, 2017); *Notre Dame Univ. v. Hargan*, No. 3:13-CV-01276, Doc. No. 86 (N.D. Ind., Oct. 24, 2017); *Roman Catholic*

Archdiocese of New York v. Hargan, No. 1:12-cv-02542, Doc. No. 122 (E.D.N.Y. Oct. 17, 2017); *Catholic Charities Diocese of Ft. Worth*, No. 4:12-cv-314, Doc. No. 127 (N.D. Tex. Jan. 11, 2018); *Ave Maria Found. v. Hargan*, No. 2:13-cv-15198, Doc. No. 26 (E.D. Mich. Feb. 2, 2018); *The Catholic Diocese of Nashville v. Hargan*, No. 3:13-cv-01303, Doc. No. 88 (M.D. Tenn. Jan. 29, 2018); and *Zubik*, No. 2:13-CV-01459, Doc. No. 94 (W.D. Pa. Oct 20, 2017).

The plaintiffs in additional cases have sought and received permanent injunctions against the Mandate. *See Wheaton Coll. v. Azar*, No. 1:13-cv-8910, Dkt. No. 119 (N.D. Ill. Feb. 22, 2018); *Catholic Benefits Ass'n v. Hargan*, Nos. Civ-14-240-R and Civ-14-684-R, Doc. No. 184 (W.D. Okla. Mar. 7, 2018); *Reaching Souls Int'l v. Azar*, No. CIV-13-1092-D, Doc. No. 95 (W.D. Okla. Mar. 15, 2018); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092-DDN, Doc. No. 160 (E.D. Mo. Mar. 28, 2018). It is reasonable to expect that more of these motions will be filed and granted. *See, e.g., Geneva College v. Azar*, No. 2:12-cv-00207, Doc. No. 144 (W.D. Pa. Mar. 20, 2018).

March for Life does not have an estimate of the aggregate size of these entities' collective workforces, but it is reasonable to estimate that

the number is in the thousands. Their workforces should be excluded from the estimates, casting additional doubt on the existence and magnitude of any injury to the States stemming from the adoption of the IFRs.

Curiously, the States offered no serious critique of the Departments' estimation methods or results. They did make their own allegations about the number of beneficiaries who would be affected by the IFRs. As revealed in the discussion that follows, each fell well short of an adequate showing.[4]

a. *New York has failed to show the number of plan beneficiaries in its state who will be adversely affected by the IFRs.*

Tacitly acknowledging the insufficiency of unsupported and conclusory claims, New York—alone among the plaintiff States—attempted to estimate the number of individuals who might be affected

[4] In addition to their unavailing effort to prove that numerous plan sponsors will invoke the new exemptions, the States resort to a "proportionality" theory. They take the Departments' estimates of affected beneficiaries and, based on population, allocate a proportional share to their own respective states. The court in *Commonwealth of Massachusetts v. U.S. Dep't of Health & Human Servs.*, rightly rejected this gambit. *See* --- F. Supp. 2d ---, 2018 WL 1257762, at *9 *et seq*. (D. Mass. Mar. 12, 2018).

by the IFRs. As discussed in detail below, their evidence is woefully inadequate, which perhaps explains why none of the other plaintiff States even attempted a similar undertaking.

The first amended complaint alleged that "[t]here are several employers in the State of New York that challenged the ACA's contraception coverage mandate and accommodation provisions in court. Hobby Lobby Stores, Inc., the lead plaintiff in the Supreme Court case challenging the contraceptive mandate . . . is a for-profit national arts and crafts store chain, which has twelve store locations and approximately 600 employees in New York." ER 276-277. The complaint claims, "[u]pon information and belief, these entities would likely avail themselves of the IFRs' broad exemption criteria and not provide their substantial number of employees and students with insurance plans with contraceptive care coverage." ER 277. It also observes that "[t]wo academic institutions located in New York also brought legal action against the accommodation provisions: The Christian and Missionary Alliance, which challenged the accommodation provisions, has an affiliate liberal arts college located in New York, Nyack College, which has approximately 2,500 students and

approximately 1,200 employees." ER 277. The complaint continues: "Biola University also brought a legal challenge to the contraceptive mandate, and its Master of Divinity graduate program, the Charles Feinberg Center for Messianic Jewish Studies, is located in New York. Biola University has approximately 1,000 students." *Id.*

The only evidentiary support for these allegations is an almost verbatim repetition of them in a nine-paragraph declaration submitted by Jonathan Werberg, a "Senior Data Scientist in [the] Department of Research and Analytics at the Office of Attorney General for the State of New York." ER 247. The only variation is him stating that "[t]here are a number of employers in New York State that have been identified to me as likely to use the exemptions provided by the IFRs because of their involvement in previous litigation challenging religious exemptions to the federal contraceptive mandate." ER 248. He does not say who "identified" these employers to him or reveal their basis for concluding that they are "likely to use the exemptions." Mr. Werberg's research uncovered a news story showing Hobby Lobby is on a *Forbes* list, Nyack's 2016 Form 1990, and Biola's website. ER 248. Based on this "evidence," Mr. Werberg declares, "[t]hus, according to my research

and analysis, there will be a substantial number of New York women who may lose health plan coverage for contraceptives as a result of these IFRs." ER 249.

Regarding Nyack College, it is true that the six Christian and Missionary Alliance (CMA)-affiliated entities, each with its own independent health plan, challenged the accommodation. *See Christian and Missionary Alliance Found. v. Burwell*, No. 2:14-cv-00580, Doc. No. 1 (M.D. Fla., filed Oct. 3, 2014). However, Nyack College was not one of them. It elected *not* to join other CMA institutions in challenging the Mandate, strongly suggesting that the school has no objection to it, has been complying with it, and does not plan to invoke the exemption provided by the Religious IFR.[5]

The second employer New York mentions is Biola University. It is true that Biola objects to providing a subset of FDA-approved

[5] Nyack does not even sponsor a comprehensive student health plan that covers things like contraceptives. http://www.nyack.edu/content/HealthInsurance (last visited Apr. 7, 2018). It only has a policy that pays $5000 per accidental injury. http://www.nyack.edu/files/Nyack_Accident_Booklet_2016-17.pdf (last visited Apr. 7, 2018). As for its employee plan, New York failed to even allege that Nyack maintains a self-insured employee health plan that is not subject to the New York contraceptive mandate law.

contraceptives that can act as abortifacients (but provides non-abortifacient ones) and thus challenged the accommodation, *see Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013). But the remainder of the allegations in the First Amended Complaint and the Werberg declaration are false, fatally undermining any suggestion that some Biola plan beneficiaries, if they were unable to get free abortifacients from the school, might end up imposing costs on the State of New York. First, the Charles Feinberg Center for Messianic Jewish Studies is *not* "[Biola's] Master of Divinity graduate program." ER 249. The Talbot School of Theology is, and it is not located in New York.[6] The Feinberg Center[7] is operated by Chosen People Ministries, only "in conjunction with Talbot."[8] Its faculty consists of six individuals, none of whom are employed by Biola.[9] Adjunct faculty are employed by other seminaries in other states.[10] The Feinberg Center has a single

[6] http://www.talbot.edu/ (last visited Apr. 7, 2018).
[7] http://feinbergcenter.com/ (last visited Apr. 7, 2018).
[8] https://chosenpeople.com/site/graduate-studies/ (last visited Apr. 7, 2018).
[9] The undersigned represents Biola University in its challenge to the HHS Mandate and can confirm the veracity of this statement.
[10] http://feinbergcenter.com/faculty-staff/adjunct-faculty/ (last visited Apr. 7, 2018).

administrative staffer,[11] who is part time and does not participate in any health plan sponsored by Biola or the Feinberg Center.[12] In any event, Biola has enjoyed the protection of a preliminary injunction since December 2013, and thus the Religious IFR did not confer any new freedom it was not already enjoying.[13]

Regarding Hobby Lobby: after it prevailed in the Supreme Court, it obtained an injunction and brought its case to a conclusion. *Hobby Lobby Stores v. Sebelius*, No. 5:12-cv-01000, Doc. No. 98 (W.D. Okla. Nov. 19, 2014). It did not amend its complaint to challenge the accommodation made available to it after its victory. Thus, New York's speculation about Hobby Lobby is without adequate warrant.

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[11] http://feinbergcenter.com/administrative-staff/ (last visited Apr. 7, 2018).

[12] *See infra* note 9.

[13] Just to further demonstrate the slapdash nature of New York's evidentiary efforts, Mr. Werberg claims that "Biola University nationally has approximately 1,000 students." ER 249. But this, too, is false. Biola's Talbot School of Theology has approximately 1,000 students, but none of them are in New York. The Feinberg Center had seven students when it launched, https://web.archive.org/web/20071011225143/http://biola.edu/news/articles/2007/071008_manhattan.cfm (last visited Apr. 6, 2018), and now has 12 students. *See infra* note 9.

It bears noting at this point that these are the only three specific employers mentioned by the plaintiffs at all in the district court—in their complaint, first amended complaint, two preliminary injunction briefs, and sixteen declarations encompassing 155 pages and 323 paragraphs of allegations. This is the entirety of their evidence for the wildly exaggerated contentions about the impact of the IFRs.

b. *California has failed to show the number of plan beneficiaries in its state who will be adversely affected by the IFRs.*

In its original complaint, the State of California alleged that "[t]here are at least 25 California employers, with 54,879 employees who will likely seek an exemption or accommodation." Pl.'s Compl. ¶ 52. The complaint does not identify any of these employers and does not explain how the State came up with this number. The complaint also declares, without support or explanation, that "California anticipates that this number will vastly expand." *Id.* In their first amended complaint, California reiterated the contentions made in the original complaint. ER 276. The complaints are unverified, and this allegation is not evidence that California needs to establish standing.

California never reasserted this contention in a sworn declaration or any other form of admissible evidence. It never identified the employers. It never said whether any of these employers are already exempt. It never said which of them have insured plans and are thus subject to California's contraceptive mandate. It concedes that some of them will likely invoke the accommodation (which would not affect beneficiaries' access to potentially objectionable drugs, devices, and services) but does not tell us which ones and how many employees they have. It never said how many of these employees are women, how many of them are of child-bearing age, how many of them use contraceptives, how many of them would not be able to afford contraceptives, and how many might be eligible for assistance from the state. California clearly had 25 particular employers in mind, but apparently did not bother to ask them what they planned to do.

The declaration of Dave Jones, California's Insurance Commissioner, is remarkable not for what it says, but for what it fails to say. Instead of providing credible estimates of how many people will lose free contraceptive coverage or how many people will turn to the state for contraceptives or other health care expenses, or how much

state spending will increase, he merely recounts how his office received some unspecified number of phone calls expressing concern. First, he states that "[s]tarting in December of 2016 or January of 2017, CDI received calls from women who were concerned that changes at the federal level could impact their access to contraceptive coverage." ER 201 ¶ 23. Second, he declares that "[s]ince the announcement of the IFR, the Department has received calls asking which health insurance policies will be impacted and when women will lose coverage for contraception." ER 201 ¶ 24. This evidence does not support California's contention that large numbers of plan sponsors will invoke the IFRs and drop some or all contraceptive coverage.

c. *Maryland has failed to show the number of plan beneficiaries in its state who will be adversely affected by the IFRs.*

In the first amended complaint, Maryland claimed that "[t]here are at least 5 Maryland employers, with 6,460 employees who will likely seek an exemption or accommodation." ER 276. Like California, Maryland never reasserted this contention in a sworn declaration or any other mode of admissible evidence, never identified the employers, never said whether any of these employers are already exempt, and

never said which of these have insured plans and are thus subject to Maryland's contraceptive mandate. It concedes that some of them will likely invoke not the exemption but rather the accommodation, which would not affect beneficiaries' access to contraceptives. But it does not tell us which ones, or how many beneficiaries they have, how many of these employees are women, how many of them are of child-bearing age, how many of them use contraceptives, how many of them would not be able to afford contraceptives, and how many might be eligible for assistance from the state. Maryland plainly had five particular employers in mind, but apparently saw no reason to inquire into what those employers actually planned to do.

The record contains a declaration submitted by Keisha Bates, a resident of Maryland. She contends that "[t]he IFRs will dramatically reduce access to contraceptive coverage for me." ER 217. She explains that she is currently working "as an inpatient gynecology/perinatal nurse at a large, urban hospital" and that she has contraceptive coverage through her employer. *Id.* She neither alleges nor even hints that her employer is eligible for an exemption under the IFR and intends to invoke it. The omission is telling.

Instead, Ms. Bates contends that she will only work for an employer that covers contraceptives and that the existence of the exemption might limit her choices of employer. *Id.* She is essentially claiming that she has a right to make sure that *every* employer offers free contraceptives. Under this line of reasoning, the pre-IFR religious exemption (which the States are not challenging) is unacceptable, as is the relatively broad exemption to the Maryland contraceptive mandate. She speculates that "at any point in my career, my employer could discontinue contraception coverage when renewing health plans for its employees" and that "this means that I could be put in a difficult position of having to switch employers to get coverage." ER 218 ¶ 5. This is textbook speculation, the sort of "evidence" that does not help establish an injury-in-fact and thus standing.

d. *Virginia has failed to show the number of plan beneficiaries in its state who will be adversely affected by the IFRs.*

In the first amended complaint, Virginia alleged that "[t]here are at least 10 Virginia employers, with 3,853 employees who will likely seek an exemption or accommodation." ER 277 ¶ 113. As with the other States, Virginia did not explain how it obtained these figures, how

the employee numbers will translate into increased costs for Virginia, or even which employers were likely to opt for the accommodation rather than the exemption.

e. *Delaware has failed to show the number of plan beneficiaries in its state who will be adversely affected by the IFRs.*

Remarkably, the first amended complaint does even to bother to *claim* that there are any Delaware employers that are poised to invoke the exemption or accommodation. Unsurprisingly, the declarations the States submitted in support of their preliminary injunction motion contain no evidence at all regarding Delaware employers who might take advantage of the freedom of choice given them by the IFRs.

f. *The States' supportive amici have failed to show the number of plan beneficiaries who will be adversely affected by the IFRs.*

The States' supportive amici, whose contentions of course are not evidence, fare no better. For example, the amicus brief filed by the American Association of University Women and others raises the specter of large Catholic universities (including DePaul, Georgetown, and St. John's) invoking the Religious IFR and dropping contraceptive coverage from their student health plans. *State of California v. Hargan*, No. 4:17-cv-05783, Doc. No. 72 at 8 (N.D. Cal. Dec. 6, 2017).

The brief observes that DePaul has nearly 28,000 students but neglects to mention an easily discoverable fact: the school does not provide a student health plan.[14] As for Georgetown, which the amicus brief observes has more than 21,000 students, it explicitly declared on December 1, 2017, following the issuance of the IFRs, that it "will continue to claim the accommodation related to contraceptive coverage under the Affordable Care Act."[15] Georgetown correctly observed that this means that the student health plan would continue to "provide separate payments for contraceptive services that plan participants use, without cost sharing and at no other cost to plan participants."[16] The St. John's student health plan is limited to accident and sickness coverage.[17] St. Leo's students currently receive contraceptives through

[14] https://offices.depaul.edu/student-affairs/support-services/health-wellness/Pages/health-insurance.aspx (last visited Apr. 8, 2018).
[15] https://studenthealth.georgetown.edu/insurance/requirements/full-time/rxcosts (last visited Apr. 8, 2018).
[16] *Id.*
[17] https://www.stjohns.edu/admission-aid/tuition-and-financial-aid/tuition/health-insurance (last visited Apr. 8, 2018).

the student plan[18] and there is no evidence that it plans to invoke the exemption available under the Religious IFR.[19]

g. *The history of state mandates undercut the States' exaggerated speculation about the number of affected beneficiaries.*

The history of state contraceptive mandates also suggests that the States' fears about the number of plan sponsors that will exercise their freedom under the IFRs are wildly overblown. Over two dozen states have adopted their own contraceptive coverage mandates, some decades ago.[20] Yet, to our knowledge, only two states faced lawsuits from plan sponsors who objected on religious or moral grounds. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 32 Cal. 4th 527 (Cal. 2004); *Catholic Charities of Diocese of Albany, Inc. v. Serio*, 28

[18] https://cdn2.hubspot.net/hubfs/206683/2017-2018_Student_Health_Insurance.pdf?t=1523037406981 (last visited Apr. 8, 2018). St. Leo's complies with the HHS Mandate through the accommodation mechanism.

[19] Notre Dame, America's most prominent Catholic university, controversially *gave up* the exemption available to it under the Religious IFR and that it had achieved through a favorable settlement of its lawsuit against the Department, electing to cover non-abortifacient contraceptive directly in its employee and student health plans. https://president.nd.edu/writings-addresses/2018-writings/letter-on-health-care-coverage/ (last visited Apr. 8, 2018).

[20] http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Apr. 8, 2018).

A.D. 3d 115, 808 N.Y.S. 2d 447 (N.Y. 2006). Notably, the states that faced lawsuits—California and New York—have the two narrowest religious exemptions in the nation; the litigation against them suggests that their attempt to balance competing interests failed. Other states, with significantly broader exemptions—concededly narrower than the IFRs but closer to them than California and New York—did not face legal challenges. To be sure, these mandates do not apply to self-insured plans, and thus the universe of potential challengers is smaller than it might have been had the mandates applied to all plans. That said, the state mandates do apply to huge numbers of employers with millions of plan beneficiaries, and the absence of legal challenges is revealing.[21]

h. *Other challenges to the IFRs indicate that the number of plan beneficiaries who will be adversely affected by the IFRs is relatively small.*

The absence of plan beneficiary challenges to the IFRs is also telling. Only one of the plaintiffs in the pending challenges to the IFRs

[21] The States may respond by claiming that objectors moved to self-insured plans to avoid the state mandates. There are undoubtedly some instances of that phenomenon, but it bears noting that moving to self-funded plans is simply not an economically feasible option for significant numbers of employers.

is a plan beneficiary, and she lacks standing because her employer has declared that it will continue to include all contraceptives in its health plan. *See Campbell v. Trump*, No. 1:17-cv-02455, Doc. No. 1 (D. Colo. Oct. 13, 2017) and Doc. No. 9 (Dec. 18, 2017). Another case did involve plan beneficiaries, but was dismissed when the plan sponsors announced they would continue to provide contraceptives in their health plans. *See Shiraef v. Hargan*, No. 3:17-cv-00817, Doc. No. 19, Notice of Voluntary Dismissal (N.D. Ind. Jan. 5, 2018). If massive numbers of plan beneficiaries stand to lose coverage due to the IFRs, it is odd that almost none of the IFRs' challengers are plan beneficiaries.

i. *In their administrative comment on the IFRs, the States once again failed to provide any evidence of the number of beneficiaries who will be adversely affected.*

The essence of the States' procedural APA claim is that they should have been given an opportunity to submit comments on the rules before they took effect, and that the Departments lacked the benefit of their input before finalizing the rules. The Departments persuasively argue in their brief why it was permissible for them to issue the rules in interim final form and receive and process comments afterwards. In any event, it bears noting that the plaintiff States, along with ten other

states, did submit a joint comment to the Departments on December 5, 2017.[22]

Two months after the publication of the rules and the filing of their lawsuit, one might have expected the States to allege with specificity the number of employers they expected to invoke the exemptions under the IFRs, the number of plan beneficiaries affected, the number of individuals that would seek benefits from the states, an estimate of the cost of satisfying increased demand, and an estimate of their additional expenditures. After all, the Departments, acknowledging the speculative nature of their assessment of the impact of the IFRs on plan beneficiaries, specifically requested this sort of input. And it seems reasonable to expect the States to explain how the HHS Mandate, with its comparatively narrow religious exemption, reduced the demand for state-funded services.

The comment the States submitted satisfies none of those expectations. The comment ignores the invitation to critique and correct the Departments' impact estimates. Instead, it simply

[22] https://www.regulations.gov./document?D=CMS-2014-0115-58168 (last visited Apr. 9, 2018).

reiterates the background of and stated rationale for the Mandate, and rehashes the legal claims asserted in this lawsuit. The disappointing content of the States' comment renders hollow their complaint that their inability to submit a comment prior to the IFRs' publication was a meaningful injury warranting a nationwide injunction.

2. *The States Have Not Shown How Many Beneficiaries Will Pursue State-Funded Contraceptives and Health Care*

The States' economic injury theory also rests on the assumption that beneficiaries whose plan sponsors invoke the IFRs will turn to the States for assistance. When an alleged injury depends upon the independent choice of a third party, a plaintiff bears a heightened burden for proving standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. at 562. The States have failed to satisfy their burden. They have not submitted adequate proof of the number of beneficiaries who will turn to State-funded programs for contraceptives and abortifacients because their employers invoke the IFRs' exemptions. They simply assume that some undetermined number will do so, and that some subset of those will be eligible to participate in their family planning programs.

The States similarly fail to prove that the some subset of affected beneficiaries will switch to less effective forms of contraception or even stop using contraceptives altogether, and then experience unintended pregnancies, all as a consequence of the IFRs. The States further claim, again without proof, that some portion of this subset will be eligible for and receive state-funded health services for unintended pregnancies.

These assumptions—together with the States' conjecture about the number of affected beneficiaries—are an insufficient foundation for standing.

It bears noting that the universe of beneficiaries affected by the IFRs is *women with health insurance*. Almost all are either employed or covered by a parent's plan; a relatively small group are enrolled in the comprehensive student plans offered by some institutions of higher education. This group is very different from the population of women who are at highest risk of unintended pregnancy. That is, members of this group are more likely to be able to bear the cost of contraceptives, especially if their employer or school covers almost all FDA-approved forms of contraception and objects *only* to abortifacients like the

morning-after and week-after pills, as is the case with most of the Protestant religious objectors to the Mandate.

In addition, the exclusion of some or all contraceptives from certain employers' plans does not deprive them of the pregnancy and childbirth coverage that is in most plans. So to suggest that the States will necessarily be forced to absorb increased costs for unintentional pregnancies is highly speculative.

The notion that the providing free contraceptives will reduce the unintended pregnancy rate is facially plausible, but the evidence just does not support it. The Institute of Medicine report on which HHS relied in crafting the original Mandate[23] fails to demonstrate that forcing employers to cover FDA-approved contraceptives will actually reduce the number and percentage of unintended pregnancies—and thus the adverse health events that may (or may not) be attributable to the unintended nature of the pregnancy. The IOM report observes that private health insurance coverage of contraceptives had increased since

[23] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, National Academies Press (2011), available at http://books.nap.edu/openbook.php?record_id=13181 (last visited Apr. 9, 2018).

the 1990s. IOM Report at 109. If insurance coverage of contraceptives were truly the key to reducing unintended pregnancies—as the Mandate and the States presuppose—then one would have expected the rate of such pregnancies to decline as insurance coverage rose. But it did not.[24]

In addition, state-specific research data show that contraceptive mandates do not substantially ameliorate the unintended pregnancy problem. Over two dozen states have adopted laws requiring group health plans to include contraceptives.[25] Yet these states experience rates of unintended pregnancy that are actually *higher* than in the states without such mandates. In the states with mandates, the average rate of unintended pregnancies in 2006 was 52.58%; the average rate in states without mandates in 2006 was 50.38%.[26] Data

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[24] *See, e.g.*, Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION at 478–85 (2011).

[25] *See* Nat'l Conference of State Legislatures, *Insurance Coverage for Contraception Laws*, http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Apr. 9, 2018); Guttmacher Inst., *Insurance Coverage of Contraceptives*, http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Apr. 9, 2018).

[26] The Guttmacher Institute maintains and publishes a "reproductive health profile" for each of the 50 states. *See* Guttmacher Inst., State

showing the unintended pregnancy rates both before and after the adoption of a state mandate is available for seven states. In five of those states (Arkansas, New Mexico, Oregon, Washington, and West Virginia), the unintended pregnancy rate actually *increased* following the adoption of a contraceptive mandate.[27] Plainly, contraceptive mandates are not an effective means of noticeably diminishing unintended pregnancies.

None of the declarations the States submitted in support of their preliminary injunction motion even claim that their respective unintended pregnancy rates dropped because of (or even just after) the Affordable Care Act's contraceptive mandate. The States' primary declarant, Dr. Lawrence Finer of the Guttmacher Institute, admits that:

> [d]emonstrating the population-level impact of the ACA's coverage provision is complicated, because the provision affects only a subset of U.S. women, and because there are so

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Data Center, http://www.guttmacher.org/datacenter/profile.jsp (last visited Apr. 9, 2018). Each state's profile includes the percentage of pregnancies in 2006 that were unintended. *See also* Kathryn Kost, *Unintended Pregnancy Rates at the State Level: Estimates for 2002, 2004, 2006 and 2008* (Guttmacher Institute, September 2013).

[27]Kathryn Kost, *Unintended Pregnancy Rates at the State Level: Estimates for 2002, 2004, 2006 and 2008* (Guttmacher Institute, September 2013).

> many additional variables that may have affected women's contraceptive use in a number of ways.

ER 158. It is hard to square this epistemic modesty with the States' boundless confidence that the IFRs will trigger an avalanche of adverse consequences.

Dr. Finer does point to studies involving abortion rates and methods of contraception, but none of these studies show that contraceptive mandates—particularly their application to the relatively small number of religious and moral objectors—reduce the rate of unintended pregnancy. To his credit—but to the detriment of the States' case—he acknowledges that two studies "found no change in overall use of contraception or an overall switch from less-effective to more-effective methods among women at risk of unintended pregnancy before and after the guarantee's implementation." ER 158 (citing Bearak JM and Jones RK, Did contraceptive use patterns change after the Affordable Care Act? A descriptive analysis, *Women's Health Issues*, 2017, 27(3):316–321, http://www.whijournal.com/article/S1049-3867(17)30029-4/fulltext; and Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017,

https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012). These studies, combined with the States' lack of affirmative evidence, cast a long shadow on their claim that the IFRs will unquestionably increase the unintended pregnancy rate and potentially increase related state expenditures.

The case that contraceptive mandates reduce unintended pregnancy rates is particularly weak with respect to contraceptives that can function abortifaciently, such as the morning-after and week-after pills. Notably, these are the only contraceptives that a large number of employers, mostly Protestant, object to. Dr. James Trussell, a Professor of Economics and Public Affairs at Princeton, is Director of the university's Office of Population Research. He published a paper entitled "Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy."[28] The paper's conclusion is unambiguous: "no published study has yet demonstrated that increasing access to ECPs

[28] James Trussell & Elizabeth G. Raymond, *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy*, available at http://ec.princeton.edu/questions/ec-review.pdf (last visited Apr. 9, 2018).

[emergency contraceptives like the morning-after and week-after pills] reduces pregnancy or abortion rates in a population." *Id.* at 15. Dr. Trussell concludes: "it is unlikely that expanding access [to emergency contraceptives] will have a major impact on reducing the rate of unintended pregnancy." *Id.* at 16.

The States did not even claim—much less produce evidence—that the HHS Mandate reduced their unintended pregnancy rates. They did not contend or prove that the demand for state-funded services decreased as a consequence of the previous version of the Mandate and that they spent less as a result. If there is no evidence that both the demand and the costs went down, then there is no evidence that the demand and costs will go back up if a comparatively small subset of plan sponsors exercise their rights under the IFRs.

3. *The States will not necessarily spend more.*

The States simply assert without proof that the conjectured increase in demand for state-funded services allegedly caused by the IFRs will cause them to spend more money. First, this is utterly speculative. Second, there is good reason to believe it is not true.

The amount the States choose to spend on contraceptives is entirely discretionary. They have not taken on an irrevocable open-ended commitment to, say, pay for the contraceptives of everyone who does not have coverage through a health plan. State programs have eligibility criteria, and the amounts the States choose to allocate each year are wildly divergent.

Significantly, the States concede that they are not meeting all the current needs. Dr. Finer's declaration admits the following:

- "In 2014, 2.6 million women were in need of publicly funded family planning in California, and the state's family planning network was only able to meet 50% of this need." ER 169.
- "In 2014, 50,000 women were in need of publicly funded family planning in Delaware, and the state's family planning network was only able to meet 30% of this need." ER 170.
- "In 2014, 298,000 women were in need of publicly funded family planning in Maryland, and the state's family planning network was only able to meet 25% of this need." ER 172.
- "In 2014, 1.2 million women were in need of publicly funded family planning in New York, and the state's family planning network was only able to meet 32% of this need." ER 174.
- "In 2014, 448,000 women were in need of publicly funded family planning in Virginia, and the state's family planning network was only able to meet 17% of this need." ER 176.

With respect to each State, Dr. Finer asserts that "[t]he increase in the number of women relying on publicly funded services will add additional strain to the state's family planning programs and providers,

making it more difficult for them to meet the existing need for publicly funded care." *See, e.g., id.*

The five plaintiff States, by their own admission, are failing to meet the needs of over 4.6 million women. Yet they simultaneously claim, at least tacitly, that they will *definitely* increase spending to meet the needs of women whose employers will exercise their freedom under the IFRs. It is difficult, if not impossible, to square these two positions. Indeed, Dr. Finer wisely elected *not* to assert the IFRs will cause State spending to rise. Instead, he simply assert that the States will feel "additional strain" on their programs. ER 168, 170, 172, 174, 176. The States have failed to identify a single case where "additional strain"—as opposed to increased expenditures—have conferred standing on a plaintiff challenging a regulatory change.

In her declaration, Maryland Planned Parenthood President Karen Nelson, to her credit, acknowledges the possibility that Maryland will *not* increase spending to meet the additional needs allegedly caused by the IFRs. She states: "If the state does not increase funding, women will be more at risk for unintended pregnancies, and the State will face the economic consequences of fewer women being able to finish their

education and advance in the job market." ER 213 ¶ 34. These economic consequences are too conjectural and remote to confer standing on the State of Maryland.

In deciding that the States had standing, the district court simply credited their conclusory allegations that the IFRs will increase their expenditures. ER 14 ("the 2017 IFRs will impact their fiscs"). This finding is unsupported by the evidence, and fatally undermines the district court's standing conclusion.

B. The States' Procedural Injury Claims are Insufficient.

To demonstrate a procedural injury-in-fact, plaintiffs must show (1) a procedural violation, (2) where the procedural rules at issue protected plaintiffs' concrete interests, and (3) that "it is reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003).

A plaintiff's interest must still be concrete and at risk: "Whether substantive or procedural injury is alleged, a plaintiff must show a concrete interest that is threatened by the challenged action." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (cleaned up).

While the typical immediacy requirement for standing is relaxed for procedural injury claims, *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 972 (9th Cir. 2003), as is the redressability requirement, *Lujan v. Defs. of Wildlife*, 504 U.S. at 572, n.7, the causation requirement remains. *See Citizens for Better Forestry*, 341 F.3d at 969 (articulating the three-factor standard for Article III standing in a procedural injury case).

The district court's order quoted *Citizens* in an attempt to claim that the causation requirement does not apply to procedural injury claims, ER 13, but the *Citizens* court's statement was specifically about procedural injury claims under the National Environmental Policy Act (NEPA): "Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Citizens for Better Forestry*, 341 F.3d at 975 (cleaned up).

The Ninth Circuit's reasoning about causation was specific to that case's circumstances:

> There is no dispute about causation in this case, because this requirement is only implicated where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant. *Idaho Conservation,* 956 F.2d at 1518 ("The causation question concerns only whether plaintiffs' injury is dependent upon the agency's policy, or is

> instead the result of independent incentives governing a third party's decisionmaking process.").

Id. at 975 (cleaned up).

By contrast, this case has no NEPA claim, and plaintiffs' alleged injury depends on third-party decisions, not direct government action. The plaintiffs have not established that those third parties will injure them. So regardless of whether the IFRs involved procedural violations, the plaintiffs failed to demonstrate that the IFRs threaten their concrete interests, for the reasons discussed above: the states do not allege with sufficient specificity the harms they claim will materialize. Therefore, the plaintiffs failed to show that their alleged procedural injury supports Article III standing.

C. The States' Interest in the Health and Wellbeing of its Residents Cannot Form the Basis for Standing in a Suit Against the Federal Government.

States have standing under the *parens patriae* doctrine to sue to vindicate their citizens' interests, commonly "in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious gases." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (denying Oregon standing because its injury claims were

merely "generalized grievances" that failed to show an "independent, quasi-sovereign interest[.]").

But it is settled law that state governments have no standing to bring such suits against the federal government. *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (finding that state governments may not bring *parens patriae* suits against the federal government). *See also State of Nev. v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (recognizing Supreme Court rule that states may not bring *parens patriae* suits against the federal government); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 354–55 (8th Cir. 1985) (same); *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012) (noting that state government admitted that it could not bring a *parens patriae* suit against the federal government); *Com. of Pa., by Shapp v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976) ("In the terms used by the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.").

In *Mellon*, the Supreme Court wrote:

> It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity

> for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

262 U.S. at 485–86 (1923) (internal citations omitted).

A state may have a quasi-sovereign interest in its citizens' health and wellbeing and bring a *parens patriae* suit on that basis. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 597 (1982) (finding that Puerto Rico had *parens patriae* standing to challenge unfair labor practices involving foreign workers in the apple-growing industry).

The district court's order cited *Snapp* for that point, ER 12, but *Snapp* is distinguishable. Puerto Rico's suit was against apple growers, that is, private parties, and is not subject to the rule about *parens patriae* suits against the federal government. 458 U.S. at 597.

Plaintiffs allege quasi-sovereign interests in their citizens' health and wellbeing. Though states claim they are suing to protect sovereign, quasi-sovereign, and proprietary interests, their citizens' health and wellbeing (including economic wellbeing implicated by potential out-of-

pocket costs), is considered a quasi-sovereign interest. ER 14. *See also Oregon v. Legal Servs. Corp.*, 552 F.3d at 971.

And plaintiffs cannot sue the federal government to protect quasi-sovereign interests in their citizens' health or wellbeing. The district court acknowledged that the states were invoking their quasi-sovereign interests, and erred by permitting a *parens patriae* suit to proceed against the federal government. Plaintiffs do not have standing to bring *parens patriae* suits against the federal government.

Given their inability to establish standing under their economic and procedural injury theories, this Court must reverse the district court's order, vacate the preliminary injunction, and remand for dismissal.

II. THE BALANCE OF THE EQUITIES COUNSELS AGAINST AN INJUNCTION, ESPECIALLY A NATIONWIDE ONE.

"A plaintiff seeking a preliminary injunction must establish that . . . the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (cleaned up). The district court abused its discretion when it ordered a nationwide preliminary injunction against the IFRs because

it did not correctly balance, or even fully account for, all the relevant interests at stake.

First, the district court uncritically accepted the States' vague and substantially inflated guesses about the number of plan beneficiaries that would lose contraceptive coverage and eventually impose additional pressures on the States to spend more. ER 14. It bears repeating that the States have not identified:

- a single plan sponsor that has invoked the new exemptions;
- a single individual who lost coverage;
- a single individual who was unable to cover the additional out-of-pocket expenses; or
- a single individual who sought assistance from them.

Nonetheless, the district court seems to have accepted the hyperbolic contentions of the States and their amici in assessing the magnitude of the interest on that side of the ledger.

Second, the district court did not properly weigh the interests of those who challenged the HHS Mandate. Although many of them have favorably settled their cases or obtained permanent injunctions against the Mandate, many of them remain embroiled in litigation with the

federal government. *See, e.g.*, *March for Life v. Burwell*, 128 F. Supp. 2d 116 (D.D.C. 2015); *Geneva Coll. v. Burwell*, 136 S. Ct. 1557 (2016); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *Ave Maria Sch. of Law v. Burwell*, 2014 WL 5471054 (M.D. Fla. 2014); *Dobson v. Sebelius*, 38 F. Supp. 2d 1245 (D. Colo. 2014); *Southern Nazarene Univ. v. Burwell*, 136 S. Ct. 1557 (2016); *Dordt Coll. v. Burwell*, 22 F. Supp. 2d 394 (N.D. Iowa 2014); *Louisiana Coll. v. Sebelius*, 38 F. Supp. 2d 766 (W.D. La. 2014); *Association of Christian Schools Int'l v. Burwell*, 75 F. Supp. 2d 1284 (D. Colo. 2014). One of the government's stated purposes behind the IFRs was to move towards concluding these lawsuits. ER 284. The district court's nationwide injunction undermines the pursuit of that objective.

Although all these parties are protected by interim relief, some litigants are not. *See, e.g., Real Alternatives, Inc. v. Sec'y*, 867 F.3d 338 (3d Cir. 2017). The IFRs provided immediate relief from the unjustified and ongoing violation of their consciences, but the district court's injunction eliminated that relief.

In addition, it is more than a little incongruous for the States to complain about the alleged shortcomings of the IFRs when some of

them have similar approaches to the balance between providing contraceptives and freedom of conscience.

First, the Commonwealth of Virginia has completely failed to adopt a contraceptive mandate. Like other states, it has the power to impose such a mandate on insured plans issued in the state. In this case, it has extolled the virtues of the federal contraceptive mandate and its alleged positive impacts on public health and state finances. And yet, it does not require health plans in the state to cover contraceptives, much less provide them cost-free. Virginia cannot be heard to complain about a relatively modest (alleged) failure by the federal government where its own actions are significantly more consequential.

The remainder of the plaintiff States have adopted contraceptive mandates applicable to insured plans. *See* Md. Ins. Code § 15-826; Del. Code § 3559(d); Cal. Health & Safety Code § 1367.25; N.Y. Ins. Code § 4303. But two of them—Maryland and Delaware—have included religious exemptions that, although not as broad as the IFRs, are significantly broader that the pre-IFR religious exemption to the federal mandate. Maryland's religious exemption reads as follows:

> A religious organization may request and an entity subject to this section [i.e., the organization's insurer] shall grant the request for an exclusion from coverage under the policy, plan, or contract for the coverage required under subsection (b) of this section if the required coverage conflicts with the religious organization's bona fide religious beliefs and practices.

Md. Ins. Code at § 15-826(c). The insurance code does not define "religious organization." Four bills have been introduced in the current legislative session that would modify the contraceptive coverage mandate, but *none* of them modifies the religious exemption. Md. S.B. 744; Md. S.B. 986; Md. H.B. 789; Md. H.B. 1024.

Delaware's contraceptive mandate applies only if the plan covers outpatient prescription drugs. Del. Code § 3559(a). Accordingly, a conscientious objector can avoid covering morally problematic items by electing not to include outpatient prescription drugs in its plan. Delaware also mandates coverage for "the insertion and removal and medically necessary examination associated with the use of such FDA approved contraceptive drug or device." *Id.* § 3559(b). There is a religious exemption from this requirement that is significantly broader than the exemption in the pre-IFR federal mandate. It reads as follows:

> A religious employer may request and an entity subject to this section shall grant an exclusion from coverage under the

> policy, plan or contract for the coverage required under subsection (b) of this section if the required coverage conflicts with the religious organization's bona fide religious beliefs and practices. A religious employer that obtains an exclusion under this subsection shall provide its employees reasonable and timely notice of the exclusion.

Del. Code § 3559(d). The Delaware code does not define "religious employer," but that phrase is undoubtedly far broader than the narrow exemption in the federal mandate the States wish to restore by invalidating the IFRs.

Moreover, both states failed to provide an accommodation-like mechanism to provide access to coverage by beneficiaries of objecting plans. As with Virginia, their complaints about the IFRs ring a bit hollow when their own laws exempt significantly more employers than does the pre-IFR version of the federal mandate, which they now claim embodies the perfect balance of competing interests from which the federal government may not depart.

To be sure, the religious exemptions in the California and New York mandates are narrower than that in the HHS Mandate. But they did not complain when the Departments expanded the federal exemption in 2013, ER 286-287, and seem to have no problem joining in litigation with a state whose "failure" is worse than the federal

government's (Virginia) and with states who have much broader religious exemptions than did the pre-IFR federal mandate (Maryland and Delaware).

In light of these considerations, as a matter of equity, the district court should not have entered a nationwide injunction.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DETERMINING THAT THE STATES WOULD SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION.

As stated above, a preliminary injunction requires a showing of irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that . . . he is likely to suffer irreparable harm in the absence of preliminary relief[.]"). *See also Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1198 (9th Cir. 1980) (holding that a district court abused its discretion by finding irreparable harm when plaintiffs alleged only economic harm).

The following kinds of harms have been found to be irreparable: a business violating a noncompetition covenant, *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); a professional basketball team losing its star athlete, *Washington*

Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D. Cal.), *aff'd*, 419 F.2d 472 (9th Cir. 1969); whaling ships being attacked and in danger of being sunk at sea by environmental activists, *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc.*, 725 F.3d 940, 944-46 (9th Cir. 2013); and people suffering from physical and mental illness who were at risk for institutionalization if their in-home care benefits were reduced, *M.R. v. Dreyfus*, 697 F.3d 706, 720 (9th Cir. 2012).

As discussed above, the States have not made the required showing: they failed to show the likelihood of their alleged economic harms, and they incorrectly equated their alleged procedural injury with irreparable injury.

A. Plaintiffs' Alleged Economic Harms Are Speculative.

Irreparable harm must be likely: "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (internal citations omitted) (emphasis in original).

In other words, irreparable harm cannot be speculative, *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th

Cir. 1984) (citing Wright and Miller, 11 Federal Practice and Procedure § 2948 at 436 (1973)) ("Speculative injury does not constitute irreparable injury."), even if the nature of the harm alleged is the kind that injunctions exist to remedy, *Winter*, 555 U.S. at 21–22 (reversing environmentalists' preliminary injunction against the Navy).

In *Winter*, the plaintiffs alleged that the Navy's sonar training exercises were injuring marine mammals. *Id.* at 12. The Supreme Court found that the plaintiffs' failure to cite a single specific example of that alleged environmental harm was a failure to show that irreparable injury was likely and accordingly reversed the preliminary injunction. *Id.* at 12, 21–22.

For purposes of this appeal,[29] the States have primarily alleged that the IFRs would cause them economic harm. As discussed in detail above, they have utterly failed to carry their burden of proving they will experience increased expenditures. Speculative harm is not irreparable harm, and the district court thus abused its discretion by preliminary enjoining the IFRs.

[29] The states' argument that constitutional violations are per se irreparable harm is not at issue on appeal, because the District Court's decision was only based on the Administrative Procedure Act claims.

B. The States Allege Procedural Injury, Which is Not In Itself Irreparable

The States also contend that the procedural injury they allegedly suffered inflicts irreparable harm on them. And the district court agreed that they had already suffered "irreparable procedural harm" but only referenced allegations related to procedural injury. ER 25. "A procedural injury on its own, however, is not necessarily sufficient to warrant the issuance of an injunction." *Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1051 (N.D. Cal. 2011) (internal citations omitted) (noting that the procedural injury in National Environmental Policy Act cases is usually related to environmental harm).

In their motion for preliminary injunction, the States cited a District of Columbia district court case, *Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17, 18 (D.D.C. 2009), for their claim of "actionable harm" due to the alleged procedural injury. But that case also notes that "actionable harm" is not necessarily irreparable. *See id.* at 17.

Elsewhere the same district court has confirmed that procedural harm is not inherently irreparable: in an environmental case, the court

found that "the plaintiffs have not established *irreparable* aesthetic injuries . . . procedural harm standing alone is insufficient to constitute irreparable harm." *Nat'l Parks Conservation Ass'n v. Semonite*, 282 F. Supp. 3d 284, 289–90 (D.D.C. 2017) (internal citations omitted).

Yet in this case, the States simply claim a procedural injury. They do not explain what makes the procedural injury irreparable. While the alleged procedural injury is tied to their alleged economic costs, those costs, as argued above, are speculative. And a procedural injury, as the cases both the States and the district court cite indicate, is not an inherently irreparable injury.

Thus, the district court, by treating speculative economic costs as irreparable harm, and by equating alleged procedural injury with irreparable procedural harm, abused its discretion.

CONCLUSION

For the foregoing reasons, March for Life respectfully requests that this Court reverse the district court's decision, vacate the preliminary injunction, and remand the case with instructions to dismiss for lack of jurisdiction.

Dated: April 09, 2018

Respectfully submitted,

s/ Gregory S. Baylor

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, March for Life advises the Court that currently pending before it are *State of California v. Azar*, No. 18-15255 (9th Cir. filed Feb. 16, 2018), and *State of California v. Little Sisters of the Poor*, No. 18-15144 (9th Cir. filed Jan. 26, 2018). These appeals stem from the same underlying challenge to the interim final rules, and the Court consolidated them with March for Life's appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,433 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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